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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Implementation of Section 309(j)
of the Communications Act -
Competitive Bidding)

PP Docket No. 93-253

PETITION FOR RECONSIDERATION AND CLARIFICATION

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SUMMARY

Unless the Federal Communications Commission (the "Commission") clarifies and refines the generic competitive bidding rules, as established in the Second Report and Order, the anticipated involvement of designated entities in the provision of broadband Personal Communications Services ("PCS") will be jeopardized.

BET Holdings, Inc. ("BHI") requests that the Commission refrain from applying a "public company" restriction on bidding credit availability in broadband PCS. Given the extensive capital investment associated with the purchase and build-out of broadband PCS systems, any such limitation would defeat realistic opportunities for the participation of a wide range of minority-owned and operated businesses. Any disparity in treatment between minority and female-owned companies in this way has no rational policy or statutory basis.

BHI also requests that the Commission confirm that the designated entity preferences are to be available to entities historically under-represented in the telecommunications marketplace. Moreover, it is imperative that the Commission confirm that preferences available to minority and female-owned entities are distinct from those established to encourage the participation of small businesses. It was never envisioned that the Commission would provide preferences only for "small" minority-owned

businesses, or limit the availability of preferences according to a predetermined, limited revenue cap.

BHI requests that the Commission clarify that any rights, privileges, options or other forms of ownership which do not, by their nature, effect the designated entity's right to control the company, or diminish the designated entity's financial stake in the venture, would not be considered in the definitional analysis applied under the Commission's Rules. Specifically, BHI submits that "designated entity" qualifications may be satisfied by a publicly traded corporation, or any wholly owned subsidiary of such corporation, if 50.1 percent or more of the voting rights in the corporation represented by its issued and outstanding stock are voted by members of minority groups, and a majority of such voting rights would continue to be voted by minority group members upon the exercise of all options or conversion rights issued or given by the corporation.

BHI believes that the Commission's anti-collusion rule is an unrealistic constraint on lawful business behavior and presents an onerous and impractical restraint on all auction participants. BHI, therefore, requests that the Commission modify the anti-collusion rule to provide for greater flexibility in regard to when a bidding arrangement may be disclosed and to whom the rule applies.

Finally, BHI recommends that the Commission foster meaningful and continuing designated entity participation by establishing additional safeguards designed to prevent designated entity "fronts" and other sham transactions.

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PETITION FOR RECONSIDERATION AND CLARIFICATION

BET Holdings, Inc. ("BHI") hereby submits its Petition For Reconsideration and Clarification of the Federal Communications Commission's ("Commission") Second Report and Order in the Competitive Bidding Rulemaking proceeding.^{1/} BHI believes that unless the Commission clarifies and refines the generic competitive bidding rules, as established in the Second Report and Order, the anticipated involvement of designated entities in the provision of broadband Personal Communications Services ("PCS ") will be jeopardized.

Specifically, BHI requests that the Commission (1) refrain from applying a "public company" restriction on bidding credit availability in broadband PCS; (2) confirm that designated entity preferences are to be available to entities historically under-represented in the telecommunications marketplace; (3) clarify that the

1/ See Second Report and Order, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, FCC 94-98 (released April 20, 1994) ("Second Report and Order").

designated entity ownership and control tests may be satisfied by any number of corporate structures or partnership arrangements; (4) modify the anti-collusion rule to permit greater flexibility in the formation of designated entity partnerships and consortia; and (5) adopt appropriate safeguards to protect against designated entity fronts or other sham transactions intended to circumvent the Commission's Rules.

I. AVAILABILITY OF DESIGNATED ENTITY BIDDING CREDITS

In an effort to create a regulatory framework for dissemination of radio spectrum licenses among a wide variety of applicants, the Commission in the Second Report and Order adopted a menu of preferences to be made available for designated entities in service-specific auctions. The Commission appropriately recognized the benefits of bidding credits, installment payment plans and tax certificates in facilitating the acquisition of licenses and the subsequent construction of radio-based telecommunications systems by designated entities. As adopted, the rules contained no prohibition on qualification as a designated entity by publicly-traded companies that otherwise meet the definition of a "designated entity."

In establishing service-specific rules for Narrowband PCS, however, the Commission inexplicably -- and without notice or comment -- retreated from its efforts to

encourage the participation of minority and female-owned entities in the provision of PCS by limiting the availability of bidding credits to non-publicly-traded minority and female-owned entities.^{2/} Without explanation, the Commission excluded a large number of previously disenfranchised companies that under the generic competitive bidding rules were fully qualified to benefit from these preferences.

This same restriction should not be adopted for broadband PCS. Given the extensive capital investment and tremendous costs associated with the purchase and build-out of broadband PCS systems, any limitation on the availability of bidding credits to publicly-traded minority or female-owned companies would defeat realistic opportunities for their participation in PCS.^{3/}

2/ See Third Report and Order, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, PP Docket No. 93-253, FCC 94-98 at para. 80 (released May 10, 1994) ("In addition, to further ensure that our rules are as narrowly tailored as possible, while still fulfilling the statutory goal, we will prohibit publicly-traded companies from taking advantage of the bidding credits."). BET submits that the Commission lacks the legal authority to withhold, i.e., write classes of designated entities out of its rules. See ACLU v. FCC, 823 F.2d 1554 (1987).

3/ Concerns regarding the ability of designated entities to compete in PCS auctions have been voiced repeatedly by both the Commission and Congress. Representative Mfume, for example, was particularly interested in the Commission's preference policies during recent hearings before the Finance and Urban Development Subcommittee of the House Small Business Committee. In questioning Chairman Hundt about these issues, Representative Mfume stated that a bidding credit of 72% may be necessary to permit designated
(continued...)

Moreover, the application of such a rule would be arbitrary and capricious and would result in significant market anomalies. Privately held companies controlled by designated entities commanding virtually unlimited resources would benefit from a bidding credit in the spectrum auction, while significantly smaller publicly-traded companies with restricted cash flow or limited credit would remain unaided by the preference. Any disparity in treatment between minority and female-owned companies in this way, has no rational policy or statutory basis.^{4/}

Congress directed the Commission to encourage the participation of all minority and female-owned entities.

3/ (...continued)
entities to compete with companies with tremendous cash flows, such as Bell Atlantic. See Federal News Service, May 20, 1994, Comments of Representative Mfume, Before The Finance and Urban Development Subcommittee of the House Small Business Committee; SUBJECT: Discrimination in Telecommunications; CHAIRED by Representative Kweisi Mfume (D-MD); WITNESSES: Reed Hundt, FCC Chairman. Given the historical and present inequities that exist for all minority and female-owned entities and Congress' statutory directive, the Commission cannot justify a preference eligibility restriction that limits preference treatment only to non-publicly traded companies.

4/ For example, if the narrowband PCS rules were adopted for broadband PCS, BHI would be unable to benefit from the bidding credit preference while TLC Beatrice International Holdings, Inc., a privately held minority-owned business, could claim the discount. TLC Beatrice, however, is significantly larger than BHI, commanding more resources and presumably having access to more favorable credit arrangements. See Black Enterprise, "B.E. 100s Overview, Coming on Strong" (June 1994). The Commission simply cannot justify such treatment in light of its directive "to ensure that businesses owned by members of minority groups and women are not in any way excluded from the competitive bidding process." See House Report No. 103-111 at 255.

Whether otherwise qualified designated entity companies are publicly traded does not alter their classification under the statute or the Commission's Rules, or in any way deprive them of the preferences available to others within the same class.

II. AVAILABILITY OF MINORITY AND FEMALE-OWNED ENTITY PREFERENCES

The Commission also must confirm that designated entity preferences are intended to benefit enumerated categories of individuals and businesses that have been historically under-represented in the telecommunications and mass media industries. As indicated in the text of the Budget Act and the legislative history, Congress' purpose for providing designated entity preferences was to disseminate licenses among a wide variety of applicants.^{5/} Consequently, the Commission recognized that the groups identified in the Budget Act have traditionally been under-represented in the ownership of non-broadcast licenses, and promulgated rules to encourage their participation on the provision of new and innovative radio-based telecommunications services.^{6/} The Chairman of the

^{5/} See Budget Act § 309(j)(3)(B) and (4)(D); House Conf. Rep. No. 103-213 at 482.

^{6/} See Notice of Proposed Rulemaking, Implementation of Section 309(j) of the Communications Act - Competitive Bidding, 8 FCC Rcd 7635, 7646 & 7648 (1993); Second Report and Order, at para. 230 ("the preferences will allow designated entities to overcome barriers that have impeded (continued...)

Commission recently confirmed the Commission's intention to use the full range of preferences to remedy the severe under-representation of minorities and women in telecommunications.^{7/}

BHI requests that the Commission reaffirm in broadband PCS that evidence of "disadvantage" against particular groups in the context of radio licensing or financial lending practices should not be the sole criteria for preference availability. Further, it must be confirmed that the preferences are not limited merely to minority or female-owned businesses seeking to enter the communications marketplace for the first time. Entities already operating within the communications industry, but seeking to expand

6/ (...continued)
these groups' participation in the telecommunications arena, including barriers related to access to capital"). See also Appendix C, Second Report and Order, Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314, 8 FCC Rcd 7700 (1993) (Report of the FCC Small Business Advisory Committee to the Federal Communications Commission Regarding GEN Docket No. 90-314, September 15, 1993) (indicating that women and minorities have encountered special barriers to telecommunications ownership).

7/ See Federal News Service, May 20, 1994, Comments of Representative Mfume, Before The Finance and Urban Development Subcommittee of the House Small Business Committee; SUBJECT: Discrimination in Telecommunications; CHAIRED by Representative Kweisi Mfume (D-MD); WITNESSES: Reed Hundt, FCC Chairman (recognizing that minorities represent 64 percent of the American population, yet minorities and women represent only 2.7% of broadcast properties; there are only seven minority-owned cable companies in the country; and there is only a .5% ownership by minorities in the telephone and radiotelephone communications sector).

their offerings to telecommunication services, should be equally eligible for the minority and female-owned entity preferences.

It is also imperative that the Commission confirm that preferences available to minority and female-owned businesses are distinct from all other preferences, including those established to encourage the participation of small businesses. As indicated in both the Budget Act and its legislative history, Congress's directive to the Commission was to promote "economic opportunity for a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women."^{8/} Each enumerated group was identified individually as eligible for preferential treatment in the assignment of radio spectrum. It was never envisioned that the Commission would provide preferences only for "small" minority-owned businesses, or in any way limit the availability of minority preferences according to a pre-determined, limited revenue cap.^{9/} To do so would contradict the explicit and unambiguous directive of Congress. Such a policy could shut out designated entities

8/ See Budget Act, Sections 309(j)(3)(B) and (4)(C).

9/ See e.g. House Report No. 103-111 at 255 ("the Commission should adopt regulations ... to ensure that businesses owned by members of minority groups and women are not in any way excluded from the competitive bidding process") (emphasis added).

that have the financial wherewithal to operate broadband PCS systems successfully.

III. MINORITY AND FEMALE-OWNED ENTITY DEFINITION

The Second Report and Order provides a strict eligibility standard for minority and female-owned entities seeking to benefit from designated entity preferences. In order to be classified as a "designated entity," minorities or women must have at least 50.1% equity ownership and 50.1% controlling interest in the auction applicant business enterprise. The interests of minorities and women will generally be calculated on a "fully-diluted" basis.^{10/}

BHI submits that "designated entity" qualifications may be satisfied by a publicly traded corporation, or any wholly owned subsidiary of such corporation, if 50.1 percent or more of the voting rights in the corporation represented by its issued and outstanding stock are voted by members of minority groups, and a majority of such voting rights would continue to be voted by minority group members upon the exercise of all options or conversion rights issued or given by the corporation. Similarly, a limited partnership with such a corporation (or a wholly owned subsidiary) as its sole and controlling

^{10/} All stock options and convertible debentures, or other conversion rights, therefore, will be considered to have a "present effect on the power to control the entity." See Second Report and Order at para. 277.

general partner also would constitute a "business owned by members of a minority group" if the general partner holds 50.1 percent or more of the equity of the limited partnership.

BHI requests that the Commission clarify that any rights, privileges, options or other forms of ownership which do not, by their nature, effect, or otherwise impact, the designated entity's right to control the company, or diminish the designated entity's financial stake in the venture, would not be considered in the definitional analysis applied under the Commission's Rules. For example, any changes in the ownership of non-voting stock would not dilute control of the company held by the designated entity. Accordingly, such changes should not deprive otherwise qualified entities from benefiting from the Commission's designated entity preferences.

Finally, in order to avoid potential confusion in the definition of minority and female-owned entities, it is important that the Commission confirm that the equity ownership and control tests are applied to the overall ownership structures or partnership arrangements established either by the company deemed to be a designated entity or by the auction participants. The requirements need not be met for each class of outstanding stock; rather, the test is to be applied in aggregate to the overall ownership and control structures in a multi-tier stock corporation.

IV. COMMISSION'S GENERIC ANTI-COLLUSION RULE

Under the Commission's Second Report and Order, PCS auction bidders are required to identify, on their pre-auction short-form applications (Form 175), any parties with whom they have entered into any consortium arrangements, joint ventures, partnerships or other arrangements or understandings of any kind relating to the licenses being auctioned, including any agreements relating to the post-auction market structure. Bidders are also required to certify that they have not entered into any explicit or implicit agreements, arrangements or understandings of any kind with any parties, other than those identified, regarding the amount of their bid, bidding strategies or the particular bidding targets. The prohibition against discussing or disclosing the substance of bids or bidding strategies persists until the winning bidder makes the final down payment on the targeted spectrum block.^{11/}

Pursuant to these Rules, all bidders will be unable to enter into any new agreements, joint ventures or similar arrangements with other entities after filing a Form 175. Because the Public Notice identifying the filing

^{11/} Winning bidders must attach as an exhibit to their long-form application a detailed explanation of the terms and conditions and parties involved in any bidding consortia, joint venture, partnership or other agreement or arrangement they have entered into relating to the competitive bidding process prior to the close of bidding. These arrangements must have been entered into prior to the filing of the short-form applications.

window for Form 175 likely will be released 75 days before an auction, it is conceivable that bidders will be locked into bidding arrangements at a point significantly before the commencement of the auctions.^{12/} Consequently, auction participants will be unable to modify their bidding strategies, consult with experts or others prior to or during the auction or enter into additional alliances with new parties any time after the filing of the short form application. The penalties associated with violating the Commission's anti-collusion rules are severe.^{13/}

The collusion rule is a straight jacket and an unrealistic constraint on lawful business behavior. For example, BHI is concerned that if a company does not identify affiliates, subsidiaries or others with whom it must consult, as companies with which it has an "understanding" regarding specific auctions, the company would be forbidden from soliciting research, sharing resources, or otherwise discussing the substance of its bids or its bidding strategies, until after the winning bidder tenders its down payment.

^{12/} Although no specific time is established for filing once the Public Notice is released, the filing of Form 175 may occur as many as 60 days before an auction.

^{13/} Bidders found in violation of the antitrust laws or the Commission's Rules may be subject to forfeiture of their down payment or their full bid amount, revocation of their license(s), and may be prohibited from participating in future auctions, in addition to treble damages and imprisonment that would apply for these violations.

BHI believes that these overly broad disclosure and standstill filing procedures present a particularly onerous and impractical restraint on all auction participants. Given that the broadband PCS auction is likely to be held soon, and the lack of familiarity of the Commission and the industry with auction rules and procedures, additional flexibility is crucial if parties are to prepare and execute comprehensive bidding strategies. BHI, therefore, requests that the Commission modify the anti-collusion rule to provide for greater flexibility in regard to when a bidding arrangement may be disclosed and to whom the rule applies. BHI suggests that the Commission instead adopt its original proposal to rely on antitrust collusion law as a safeguard against collusion. The Commission would still be able to detect anti-competitive behavior without depriving auction participants of important and otherwise legal strategic planning opportunities.

V. DESIGNATED ENTITY SAFEGUARDS

Although the Commission has taken steps to prevent designated entity "fronts" and to detect sham transactions, BHI believes that additional safeguards may be necessary to ensure that only bona fide designated entities are afforded preferential treatment. Because the Commission's designated entity program will be a failure if designated entities participate merely to acquire licenses to later sell them,

BHI requests that the Commission's rules foster meaningful and continuing designated entity participation.

VI. CONCLUSION

For the foregoing reasons, BHI requests that the Commission modify or clarify its generic auction rules to provide designated entities real opportunities to participate in the development and introduction of new and innovative broadband PCS services.

Respectfully submitted,

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